

GENERAL COMPARATIVE VIEW OF THE FRENCH CONSTITUTION

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The French Constitution of October 4, 1958 is about to enter its third year and it is already possible to give a comprehensive opinion of the form of government which it has instituted. The current government is popularly called the Fifth Republic though there has been no break, with regard to fundamental principles, from the government which preceded it.

A reading of the text submitted to public referendum on the 28th of September might already have shown what idealogical basis the new constitution had in the mind of General de Gaulle. It indicates also what precedents in recent parliamentary projects or in comparative constitutional law were influential.

But for two years this text, more than any other, has been put to the test of events. To be sure, in constitutional law, practices, customs, traditions and habits play a role almost as important as the text itself. And it is always in the first years of a regime that these practices are created and this custom is born. The government which arose from the constitution of 1958, however, has taken a direction rather different from what one might have suspected from simply reading it. This evolution is no doubt due in part to the personality of General de Gaulle, who was elected president of the Republic. But it is due perhaps just as much to a general tendency of the present era, in democratic countries, to strengthen the executive branch of government, a tendency which owes as much to technological motives as to the general evolution of the position of nations in the world.

In this study it is proposed to undertake a general examination of the French political system, taking into consideration the text as well as constitutional practice. This order is characterized first of all by a new arrangement of the relationship between the government and the Parliament, with the aim of assuring an equilibrium which the French application of the parliamentary system had not often enjoyed. But it emerged quite as much—and perhaps more so in the eyes of the average observer—as a strengthening of the presidential office.

These are the two parts which this study will include.¹ Juridicial

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¹ The bibliography relative to French constitutional order is already too extensive to be included in entirety. Only the principal sources will therefore be indicated.

The text of the constitution (92 articles) together with the organic laws was

and political problems involving the community which the French Republic forms with overseas nations will be omitted; first of all because I propose to study only the French political order, and secondly because this community is in the process of being formed and it is impossible to give a final opinion about it.

ARRANGEMENT OF THE RELATIONSHIP BETWEEN THE GOVERNMENT AND PARLIAMENT

The system instituted by the constitution of October 4, 1959, is a democratic and a parliamentary system.

The *democratic character* of the system is expressed in the Preamble of the constitution, which connects it directly with the Declaration of the Rights of Man of 1789 and with the Preamble of the constitution of 1946. The latter text completed the declaration of rights by recognizing "as particularly necessary to our times" a certain number of economic and social rights which are added to the political rights. These two proclamations of principles must be considered today as belonging to positive law and are applied by the courts as "general principles of law."²

On the other hand articles 2 and 3 of the constitution take up again the whole body of traditional principles in France. In particular it is reaffirmed that "sovereignty belongs to the people who exercise it through their representatives and through the power of referendum" (art. 3). In addition, for the first time in France, the constitutional existence of political parties is established (art. 4).

As for the *parliamentary character* of the system, this was prescribed by the constitutional law of June 3, 1958, authorizing the government to establish a constitutional draft which would be submitted to the referendum. Indeed, one finds in the political institutions the traditional elements of the republican parliamentary system such as France has practiced it since 1875, that is, a President

published by the "Imprimerie des journaux officiels" (no. 1119, 1959). The "Travaux préparatoires" are being published by the "Documentation française," a service attached to the Prime Minister. Tome I (Opinions and Debates of the Constitutional Consultation Committee) appeared in 1960. Finally, it is useful to cite an official "Commentaire" of the Constitution, also published by "Documentation française." (Notes et études documentaires, no. 2530, 1959).

Among the works devoted to the constitution I shall cite: M. Duverger, "La Vème République," Paris (Presses universitaires), 1959 and J. Chatelain, "La nouvelle Constitution et le régime politique de la France," Paris (Berger-Levrault), (2d ed. 1960). Finally it is also necessary to refer to numerous special studies published since 1958 in the "Revue du droit public et de la science politique" (R.D.P.) and in the "Revue française de science politique" (R.F.S.P.).

² V. J. Georgel, "Aspects du préambule de la Constitution du 4 octobre 1958," R.D.P. 85 et seq. (1960).

not responsible except in the case of high treason (art. 68), and a government responsible before Parliament (art. 20). In fact this responsibility may be called up only before the National Assembly, elected directly by universal suffrage. As for the Senate, whose members are elected through indirect suffrage by the representatives of local communities, it exercises only legislative power and has no power to raise the question of governmental responsibility (art. 49). In this regard the constitution of 1958 continues the system of 1946.³

If the traditional institutions of the parliamentary system are found in the constitution, however, its authors endeavored to arrange the relationship between the institutions so as to establish between them an equilibrium which did not exist before.

The essential defect of French parliamentarianism since 1875 had been a chronic ministerial instability, due to the fact that coalition governments were powerless before a parliament which controlled their actions at all times.⁴ The desuetude of the right of dissolution, used only twice and then unskillfully in 1877 and 1955 accentuated this disequilibrium still more. In fact France was practicing "monist parliamentarianism," placing the government in the hands of the Parliament, a system closer to rule of the assembly than to parliamentarianism as it exists in England.

But inversely the omnipotent Parliament could not do everything and thus granted, extra-constitutionally, important delegations of power to the government. Such is the application of the "laws of full powers" or the "laws of special powers" which became almost chronic beginning in 1926 and which the constitution of 1946, despite a formal statement (art. 13), could not prevent.

The constitution of 1958 attempts to guard against disequilibrium in these two directions by limiting parliamentary prerogatives in the exercise of the legislative function as well as in control of governmental action. To regulate the conflicts which might arise in this area, a special body, the Constitutional Council, has been created.

Only more experience will show whether, in struggling against the excessive power of Parliament, the strict limitation of parliamentary jurisdiction has been carried too far. The point of balance in this matter is always difficult to find.

³ The government does have the option of "asking the Senate's approval for a declaration of general policy" (art. 49, al. 4), but the vote to intervene cannot constitute a sanction.

⁴ V. A. Soulier, "L'instabilité ministérielle sous la IIIème République," thèse Strasbourg, 1939; M. Merle, "L'instabilité ministérielle sous la IVème République," R.D.P. 390 (1951).

THE LIMITATION OF PARLIAMENTARY JURISDICTION IN
CONTROLLING GOVERNMENTAL ACTION

In certain respects the new system re-establishes the regular principles of a parliamentarianism from which the constitution of 1946 had deviated. But in other areas, by far the most important, it institutes new rules destined to "rationalize" the parliamentary system.

Nomination of the Prime Minister and of the Ministers

The choice of a government, in a parliamentary system, devolves on the Chief of State. The latter, because he is placed above party politics, has the power to choose the one who will direct the governmental team. Election by Parliament also obviously places the head of the government in the power of the assembly and is a visible sign of "conventional" government behind which a one-party order may be quite easily concealed.

Article 8 of the constitution abandons the complex practices of the Fourth Republic and decides that "the President of the Republic names the Prime Minister." Of course, the Prime Minister so named must receive a vote of confidence from the Chambers. It is characteristic to note that M. Michel Debré, named Prime Minister in February of 1959 presented himself before the Parliament to have his program and the make-up of his government approved. In doing so he re-established in the customary manner the practice current since 1875 and which the system of 1946 had already partially re-established.

As for the members of the Cabinet, they are named by the President on the suggestion of the Prime Minister and their duties are terminated in the same way (art. 8, al. 2). Thus in making ministerial changes the Prime Minister makes his own decisions and is not obliged to obtain the consent of Parliament. This practice, which has been common since 1946 is consistent with the theory of the parliamentary system and introduces more cohesion (one might even say more discipline) into the government's action. It really makes the Prime Minister the head of the Cabinet. To be sure this supremacy exists only if the decisions of the Prime Minister do not meet the unshakeable opposition of the Parliament and it finds itself in certain respects linked with the responsibility of the government. Nevertheless, at the time of the numerous ministerial changes which have been made since 1959 the government has always implicitly obtained the consent of the National Assembly.⁵

⁵ See however the diverse reactions aroused in public opinion by the departure of M. Pinay, Minister of Finance, in the newspaper *Le Monde*, January 16, 1960.

"Rationalization" of the Parliamentary System

Since the Weimar constitution politicians and jurists have been striving to rationalize the parliamentary system, that is, to discover the procedures which prevent it from resulting in dire consequences. Indeed the precedent is not encouraging. . . . But the attempts are always made in this direction, as for example in the Fundamental Law of the German Federal Republic. There are three procedures here: the incompatibility of parliamentary and ministerial functions; the procedure of oral questions with debate; and the engagement of ministerial responsibility.

A. Incompatibility of Parliamentary and Ministerial Functions⁶

This incompatibility, set forth in article 23 of the constitution, was presented at the time of the drawing up of the text of the constitution as a means of fighting against ministerial instability, which arises in part from the ambitions of members of the Parliament who wish to become ministers. If they know that in doing so they cease to be members of the Parliament for the duration of the session, their ambitions are restrained somewhat.

In fact, however, this practice, which is not new and which is found in France in the constitutions of the Revolution and in that of 1852, is quite contrary to the very spirit of the parliamentary system. Constituting a government with non-parliamentarians (or with former parliamentarians), when it is not a sign of an authoritarian regime, is the sign of presidential rule. When the number of "technicians" in a government becomes larger than the number of parliamentarians a form of presidential government necessarily evolves, for ministerial solidarity obviously loses significance.⁷

B. Oral Questions with Debate

Article 48, paragraph 2 of the constitution provides that "one meeting per week is reserved by priority for questions from members of the Parliament and for answers by the government." Thus a practice which is very well known in British parliamentary law and which the rules for the assemblies of preceding systems had instituted without constitutional provision becomes constitutionalized. These questions by members of the Parliament may be either oral or written and the minister concerned answers in the same way.

⁶ V. A. Demichel, *De l'incompatibilité entre les fonctions de ministre et le mandat parlementaire*, R.D.P. 16 (1960).

⁷ Of 17 ministers (excluding secretaries of state) the cabinet of M. Michel Debré includes 9 "technicians" and 8 parliamentarians, who, moreover, have had to relinquish their seats in conformity with article 23.

Besides the vote of confidence in the government which will be discussed later, these questions are the only means of control which members of the Parliament have in regard to the government, particularly because the practice of calling for a closed questioning is generally considered to have disappeared. In the course of the drawing up of their own rules, however, both deputies and senators wished to re-establish a practice which the second assembly (the Council of the Republic), under the Fourth Republic, faced with an inability to challenge the responsibility of the government, had successfully created. The practice consists of the oral question put by a member of Parliament to a minister, followed by a debate in which all interested members participate, and ending in a vote. It was hoped that this procedure could be re-instituted in a prescribed manner without being unconstitutional. Such a bill caused passionate debates in both assemblies and came up against the hostility of the government. The latter declared, in effect, that the only ways of challenging its responsibility were those set forth in articles 49 and 50, which will be considered shortly. The oral question with debate re-established the system of interpellations, or, better still, the "implicit question of confidence" used under the Fourth Republic to censure the government without utilizing constitutional procedures. To be sure, the government is not legally required to resign, but it creates an unfavorable prejudice against itself which diminishes its authority.

The opposition of the government led the parliamentarians to adopt a compromise solution, but the bill of procedure kept the idea of a proposal for a resolution which would end debate and call for a vote. But the Parliament, as we shall see, no longer exercises complete sovereignty relating to standing orders, and the rules of the assemblies must be approved by the Constitutional Council. For motives indicated above, this High Court refused to approve the passages relative to proposals for resolution.⁸

Besides the oral and written questions which carry no sanctions, the only ways to challenge the responsibility of the government are therefore found in articles 49 and 50 of the constitution.

C. The Challenging of Ministerial Responsibility

Parliamentary practice under the Third and Fourth Republics knew an infinite number of means for challenging this responsibility, in direct or indirect, visible or invisible ways. This cleverness of the parliamentarians may be listed among the other causes for the in-

⁸ Decision of the Constitutional Council published by the *Journal officiel* of July 3, 1959. See on this question D. Ruzie, "Le nouveau règlement de l'Assemblée nationale," R.D.P. 863 et seq. (1959).

stability of ministries; and it persisted despite certain fragile barriers which the constitution of 1946 tried to set up against it.

In the drafts for reform of that constitution an amelioration of procedures, particularly in constraining the members of Parliament to assume their responsibilities, had been strived for. Even the system of disinvestiture had been proposed—with investiture provided for, in the designation of a chancellor, by the Fundamental Law of Bonn.⁹ In fact articles 49 and 50 take up again in its general outline the plan for revision set forth at the beginning of 1958 by the government headed by M. Félix Gaillard.

The responsibility of the ministers may now be engaged in three ways:

1. *The motion for censure* (art. 49, par. 2). In this case challenging of responsibility comes from the National Assembly. The motion must be filed by at least one-tenth of the members of the assembly. The vote takes place 48 hours after the filing (a practice inspired by the constitution of 1946 and permitting reflection). Only favorable votes are counted, that is to say that the deputies who abstain are considered as against the motion. If the motion obtains a majority of the votes of the members of the assembly, it is adopted and the government is required to submit its resignation to the President of the Republic (art. 50). If it is not adopted, no other motion can be adopted in the course of the session unless the government takes the initiative of engaging its own responsibility.

2. *The question of confidence on a text* (art. 49, par. 3). In order to have a bill which it favors passed, the government may be led to put pressure on the Parliament by posing the question of confidence. In this case “the text is considered as adopted, unless a motion of censure, submitted within the next 24 hours, is passed” under the same conditions as stated above.

3. *The question of confidence on the government's program or a declaration of general policy* (art. 49, par. 1). After deliberation of the Council of Ministers the Prime Minister may engage the responsibility of his government before the National Assembly. In this case there is no special procedure and the assembly votes in the ordinary manner. But the government will use this procedure only in exceptional cases: at the time of its inauguration (although it is not legally bound to do so) and at a time when it is about to make an important decision.

These procedures until now have been used very little. In two years there have been only two moves to censure, which were rejected. It might be said that the attempt to stabilize the parliamentary sys-

⁹ See *La révision constitutionnelle devant le Parlement*, R.D.P. 81 (1958).

tem has succeeded if there were not other legal and factual reasons which explain it better.

THE LIMITATION OF PARLIAMENTARY JURISDICTION IN REGARD TO THE EXERCISE OF THE LEGISLATIVE FUNCTION

The constitution of 1958 limits parliamentary jurisdiction on legislative matters in two ways: first by giving an essential place to the government in legislative procedure, then by proceeding with a radical division between legislative and statutory jurisdiction.

The Modifications of Legislative Procedure

Until 1958 this procedure was left entirely to the Parliament and such a sovereignty had constantly caused demagogic debates in numerous cases. The reforms brought about in this area by the constitution of 1958 consisted of giving the government an important if not preponderant role. In certain regards these reforms were inspired by British parliamentary procedure, but even in this case it may be asked if the reaction was not too excessive in bringing about a useless humiliation of the Parliament.

To be sure the members of Parliament have the right to initiate legislation (art. 39), as does the government, but this equality very quickly gives way to a supremacy in many areas.

It is true that the members of Parliament have the right of initiative in legislative matters and the right of amendment. Article 40, however, states that their proposals are unacceptable "if their adoption would mean either a diminution of public resources or the creation of aggravation of a public burden." Felix Gaillard's proposal, itself inspired by British parliamentary procedure, forbade the members of the Parliament the initiative only in budgetary matters. Article 40, on the other hand has a general compass which permits the government to declare as unacceptable a great number of resolutions, for it is obvious that the reason may be frequently invoked. This first barrier, to which the government has frequent recourse, is manifestly of such a nature as to diminish considerably parliamentary initiative.

Before 1958 the number of commissions stood at 19 and their number might have been increased still more, for the figure depended only on the regulations of the assemblies. Today, by virtue of article 43 of the constitution, the number of commissions is limited to 6 in each assembly. Each one of these commissions thus has a considerable membership, about one hundred deputies in the National Assembly, and it is easy to understand that legislative work is not readily accomplished, while the influence of the commissions is at the same time decreased.

According to article 48, paragraph 1, "the order of the day in the assemblies will include by priority and in the order fixed by the government the discussion of bills brought in by the government and proposals of bills accepted by it." Thus the assemblies lose a prerogative which they valued highly and which was the symbol of their sovereignty: the control of their agenda. They had indeed abused this control, especially under the Fourth Republic, but here again the solution is too drastic, though it also is inspired in certain respects by British practice.

Article 44 offers the government a weapon of great interest for ending a debate in its own interest, a device which the government until now has applied very broadly. If the government so demands "the gagged assembly declares itself by a single vote on all or part of a text under discussion, retaining only amendments proposed or accepted by the government." This arrangement incontestably has the advantage of avoiding disparate texts, but above all it permits the government to stop a discussion in order to ask for an overall vote and thus exert pressure on the deputies. Each time that it is applied this arrangement arouses sharp criticism from the deputies who feel themselves to be "under the thumb" of the government. The Constitutional Council, however, has just accorded it the widest possible scope.¹⁰

Finally, in budgetary matters, article 47 of the constitution states that if the budget proposal has not been adopted within a period of 70 days by the Parliament, its conditions may be put in force by ordinance. This step, taken against the demagogical budgetary practices followed for many years, is mainly intended to force the deputies to act more strictly in this area. It is stated in the reform of budgetary procedures instituted by the decree of June 19, 1956, and is today governed by the organic ordinance of January, 1959.

The Division of Legislative and Rule Making Jurisdiction

In the French constitutional tradition the legislator is sovereign because he is the expression of the national will. By this fact a law which is voted by the Parliament may govern all matters and has a universal application. Regulations adopted by the government thus have, in principle, an inferior value, for the "executive power" is by definition never primary.¹¹

This supremacy and universality of the legislator, however, kept

¹⁰ Decision of January 15, 1960, recorded in the *Recueil Dalloz*, 1960, p. 351 with a note by M. Léo Hamon.

¹¹ The theory of the law in French Constitutional Law has been perfectly stated by R. Carré de Malberg, "La loi, expression de la volonté générale," Paris, 1932.

running more and more into the material obstacles due particularly to the increasingly technical aspect of legislation and the slowness of legislative procedure. Such a situation from 1926 on had led the governments to ask from Parliament the vote for "laws of full powers" permitting them to proceed by decree to reforms which should have been the result of laws.

The practice of "delegated legislation" lacked, in France, any theoretic basis since the legislative power by definition cannot be delegated, Parliament being unable to delegate a jurisdiction which belongs only to the people which it represents. In fact it terminated in a veritable abdication on the part of the Parliament and had been forbidden by article 13 of the constitution of 1946. Since 1946, though, the practice of delegated legislation had reappeared, each government demanding at the time of its investiture the vote for a law of special powers assuring it of a few months of security and permitting it to proceed with the most important reforms.

The constitution of 1958, by imitating the German or Italian Constitutions or American or British practices, would have been able to make the use of delegated legislation constitutional. The solution adopted is broader. It is inspired by proposals made in 1946 before the Constituent Assembly and discarded in the name of the sovereignty of the legislator.¹²

Article 34 of the constitution sets up a list of the only matters which may be the object of a law in their totality or in their fundamental principles. This list, which was rather short in the draft of the constitution, has been lengthened and made more precise following the examination of the draft by the Council of State. Concerned, for example, are civil rights, nationality, the status of individuals, penal procedure, *etc.* . . .¹³ Matters other than those provided for in article 34 have a statutory character (art. 37), that is, the government is free to regulate them by decree, in the same way that it may also modify by decree previous laws interposed into these non-legislative matters.¹⁴

The list in article 34 is not, however, a rigid list. It may be added to by an organic law passed by the Parliament (art. 34 *in fine*). Thus, according to the desires of Parliament, the number of matters which are reserved to it may be increased and in this way parliamentary sovereignty is indirectly safeguarded.

¹² See J. de Soto, "La loi et le règlement dans la Constitution du 4 octobre 1958," R.D.P. 240 (1959); M. Waline, "Les rapports entre la loi et le règlement avant et après la Constitution de 1958," R.D.P. 699 (1959).

¹³ See the text of article 34 in the appendix.

¹⁴ On this subject see the decision of the Constitutional Council published in the *Journal officiel* of December 2, 1959.

But on the other hand this list may be temporarily restricted. In fact the constitution of 1958 makes the use of laws of special powers unconstitutional. With the new division of legislative and statutory jurisdiction such a practice might have seemed useless. Article 38, however, permits the government, "for the execution of its program, (to) ask Parliament for authorization to take measures, during a limited period, which are normally the function of law." Without having become as frequent as before 1958, this practice is thus used again. Its most obvious manifestation may be seen in the law of February 4, 1960, authorizing the government to take certain measures relative to maintaining order, safeguarding the nation, and the pacification and administration of Algeria.

THE CONSTITUTIONAL COUNCIL

The establishment of a new and more complex relationship between Parliament and the government was to necessitate the creation of a regulatory body. To answer this need the Constitutional Council was created by articles 56 and following of the constitution. At first glance one might have believed that with this provision France would have a competent judicial body to pass on the constitutionality of laws, as in the United States or the German Federal Republic. The developments which follow shall show that such is not the case, for neither in its competence nor in its composition may the Constitutional Council be compared to the Supreme Court of the United States.¹⁵

Composition

The Constitutional Council is made up of nine members each of whose term lasts nine years and is not renewable. One third of the body changes every three years (art. 56). In addition former presidents of the Republic belong to this council. In all, then, the council contains eleven members, with the two former Presidents of the Republic, Vincent Auriol and René Coty.

If the former presidents, whose presence is beyond question, be excepted, the composition of the council is still essentially political, for it includes three members named by the President of the Republic, three named by the President of the National Assembly and three by the President of the Senate. The designation of the members has accentuated this character, for it has become obvious that they were appointed less for their judicial competence than for a certain political

¹⁵ It is astonishing that the Constitutional Committee has not yet been the subject of a study. On the problem of the control of the constitutionality of laws in France, see J. Lemasurier, "La Constitution de 1946 et le contrôle du législateur," Paris, 1954.

"dosage." The letter of May 25, 1960, in which President Auriol announced that he would no longer attend the meetings is the sign of an uneasiness due to an overly political make-up of the Council.¹⁶

Powers

The idea of a control of the constitutionality of laws is quite contrary to the French constitutional tradition for two reasons: the legislator, who expresses the national wills, is sovereign in such a way that a censure by any jurisdiction, no matter how high, is inadmissible; on the other hand the judge does not create law as in the countries of common law. On the contrary he has the function of assuring that laws be applied. These two factors, exactly the opposites of those which prevail in the United States, explain why the French people, at all periods, and French legal philosophy have never wished to permit control of the constitutionality of laws by the courts.¹⁷

The creation of the Constitutional Committee by the constitution of 1946 did not break with this tradition, for this committee, which had practically never functioned, was in fact intended to control conflicts between the two legislative assemblies.

Conversely, the Constitutional Council that was created in 1958 was presented as an important mechanism of the new political system. Its powers are fixed by articles 58 and following of the constitution, supplemented by the organic ordinance of November 7, 1958. They may be grouped under three headings.

A. Electoral Jurisdiction

The Constitutional Council oversees the conduct of election of the President of the Republic. It examines claims and announces the results of the voting (art. 58).

In the same vein it is empowered to assure the regularity of operations of the referendum and to announce the results (art. 60).

Finally, it is the judge of "electoral disputes," passing on all contests which arise during the election of deputies and senators. Traditionally this power belonged until 1958 to each chamber, which, by reason of the sovereignty of Parliament, was the judge of its own elections. But such a power often gave rise to the handing down of decisions which were based more on political than judicial considerations. Certain election annulments passed down during the general elections of 1956 in particular showed what abuses may be committed in this area. Inspired at least in part by the system in force in England, the authors of the constitution wished to avoid such abuses. The

¹⁶ See the text of this letter in *Le Monde* July 3-4, 1960.

¹⁷ See Carré de Malberg, *op. cit.*, 103 ff. J. Lemasurier, *op. cit.*, *passim*.

solution adopted will be good if the Constitutional Council is able, on this point, to create a tradition and a jurisprudence.

B. Automatic Examination of the Regularity of Organic Laws
and of the Statutes of the Assemblies

According to article 61, paragraph 1, "organic laws, before their promulgation, and the standing orders of the parliamentary assemblies, before their institution, must be submitted to the Constitutional Council which passes on their constitutionality."

Organic laws are those which have as an object the planning of the institutions provided for by the constitution. They must be adopted after a period of fifteen days following the introduction of the bill or the proposal according to certain rules of procedure specified in article 45. But above all they may be promulgated only if the Constitutional Council has declared them to be in conformity with the constitution. Beyond all dispute the Constitutional Council is thus given a sort of "supra-legislative" power which reduces the parliamentary authority accordingly. What would happen, for example, if the Parliament, in accordance with article 34, should wish to increase the number of matters which are reserved to it?

In the same way the council automatically controls the regularity of the rules of the assemblies, and the rather restrictive solution which it adopted in regard to oral questions with debate has already been shown.

C. Control of the Constitutionality of Laws. (art. 61, par. 2)

This is the essential competence of the Constitutional Council: it decides in effect if a law is in conformity with the constitution. But in this regard one cannot speak of true control of the constitutionality of laws for two reasons. First of all because laws are submitted to the council "before their promulgation," that is before they have been put into effect. Secondly because the council may be called upon by only four persons: the President of the Republic, the Prime Minister, and the President of each assembly. In fact, as article 41 of the constitution shows, the Constitutional Council has as a principal function the decision of conflicts between the government and Parliament in regard to the new division of legislative and rule making powers.¹⁸ It is difficult to conceive, for example, that a law be

¹⁸ Art. 41: "If it appears in the course of legislative procedure that a proposal or an amendment is not in the domain of the law or is contrary to a delegation accorded under the terms of article 38, the government may pose the question of its inadmissibility.

"In case of disagreement between the government and the President of the assembly concerned, the Constitutional Council, at one or the other's request, decides within a period of eight days."

referred to the council for violation of the general principles contained in the Preamble or called up by it.¹⁹ In any case, a provision declared unconstitutional may not be promulgated nor put into force (art. 62). The decisions of the council are not subject to appeal and apply to all administrative and jurisdictional authorities (art. 62).

CONCLUSION

The overall impression which prevails after these new arrangements of the relationship between the government and the Parliament is a lowering of parliamentary prerogatives. To be sure such a tendency is rather general and may be seen, in law and in fact, in the present parliamentary practice in Germany and in England. It is accentuated in France by the fact that in the elections of 1958 the U.N.R., the party favorable to General De Gaulle, obtained a considerable majority and since that time the government has always enjoyed a rather large majority. The fact that people have been able to speak of the "chambre introuvable," thinking of the ultra-royalist chamber elected in 1815, is symptomatic, although the comparison is exaggerated. But it is certain in any case that this situation has lowered the constitutional position of the Parliament and given some pliancy to the system.²⁰

THE PRESIDENT OF THE REPUBLIC

It was said of the constitution of 1875 that it was "a Senate." It may be said of the constitution of 1958 that it is "a President." This pre-eminent position of the President of the Republic is formally expressed, moreover, since the articles which concern him head up the constitution (art. 5-19).

Nor has General De Gaulle ever hidden the conception that he had of the Republic; but it seems that under the pressure of circumstances and perhaps also through the evolution of his thought, such a conception has been transformed in the direction of an increase in the rights accorded to the Chief of State.

In the speech given at Bayeux on June 16, 1946, at the time when the Constituent Assembly was deliberating on the draft which was going to become the constitution of 1946, General De Gaulle stated:

¹⁹ See on this subject R. Drago, note under the Council of State June 26, 1959, *Syndicat général des ingénieurs conseils*, Rec. Sirey 102 (1959).

²⁰ On parliamentary activity see the report of MM. L. Hamon and J. M. Cotteret, R.D.P. 648 (1960).

It has not been possible in the framework of this study to examine the statutes of the Senate. See on this subject J. Roche, *Le Sénat de la République dans la Constitution de 1958*, R.D.P. 1126 (1959).

It is from the Chief of State, placed above parties, elected by a college which includes the Parliament but is much broader and composed in such a way as to make him President of the French Union as well as of the Republic, that the power of the executive should proceed. It is up to the Chief of State to serve the general interest in the choice of men with an orientation independent of the Parliament. His is the authority for naming ministers and first of all, of course, the Premier who is to direct the policy and the work of the Government. It is the function of the Chief of State to promulgate the laws and make decrees, which commit the state. His is the task of presiding over the councils of government and exercising that influence of continuity without which a nation cannot get along. His is the power of serving as arbiter over political contingencies, either normally through the council, or, in moments of serious confusion, by inviting the country to make its sovereign decision known through elections. It is up to him, if the country should be in peril, to be the guarantor of national independence and of treaties concluded by France.²¹

But in the very text of his *mémoires* published in 1959, General De Gaulle has a more precise notion of the presidential office.

In my opinion, the State must have a head, that is to say a chief, in whom the nation may envisage, above fluctuations, the man in charge of the essentials and the guarantor of its destinies. . . . Beyond the circumstances in which it would be up to the President to intervene publicly, government and Parliament would have to collaborate, the latter controlling the former and being able to overthrow it, but the national magistrate exercising his arbitration and having the power to appeal to that of the people.²²

Bearing in mind such a conception of the Presidency it behooves us to study what the office of President of the Republic is according to the text of the constitution and what the practice has been since 1958.

THE PRESIDENT OF THE REPUBLIC ACCORDING TO THE CONSTITUTION OF 1958

If the position of the President of the Republic is preeminent in the text of 1958, it is nevertheless in conformity, on many points, with the classical conception of the Chief of State in the parliamentary system. It departs from it, however, on certain points concerning personal powers not to be expected in a parliamentary regime.

I. Designation of the President of the Republic

Republican parliamentary systems have never been able to solve satisfactorily the problem of the Chief of State. Born into a monar-

²¹ Speech published in the appendix to the "*Mémoires de guerre*" of General De Gaulle, t. III 651 (1959).

²² C. De Gaulle, "*Mémoires de guerre*," t. III 240 (1959).

chical system, the parliamentary system needs a monarch who assures the continuity of the state though he exercises no effective governmental powers. Under the Third and Fourth Republics the President of the Republic was elected by the two houses of Parliament. It must be said that, even in the cases in which the election was difficult, this manner of designation had never harmed the moral authority of the President, as much because of the idea which he had of his duties as because of a sort of implicit agreement among the parties.

Following in this respect the ideas of General De Gaulle expressed in the speech at Bayeux, the authors of the Constitution of 1958 nevertheless preferred election by an enlarged electoral college composed of the members of Parliament (695), the members of the departmental assemblies (3,149), and the representatives of the municipal assemblies (72,466). This electoral college had the effect of giving an advantage to the municipalities, particularly the rural ones, of approximately 80,000 electors, there were roughly 31,000 mayors of small communities.

In theory the make-up of this electoral college seems rather representative of France and perhaps of such a nature as to reinforce the position of the President of the Republic. It certainly has no drawbacks when the candidate is a personality of first rate stature who is known throughout the whole nation.²³ But in the case in which no personality could really impose itself, the run-off elections (art. 7) can give surprising results as a consequence of the rather incoherent electoral body. When the election was the task of the two chambers of Parliament, an agreement could be reached more easily.

In fact this electoral system will lead the parties or their coalitions to seek, as in the United States, candidates who are sufficiently symbolic and who can exercise great authority on the country as a whole. However that may be, if it is continued, it will bring about a radical change of political customs in this area.

II. *Powers of the President of the Republic*²⁴

The powers of the President are summed up in article 5 of the constitution: "The President of the Republic sees to it that the Constitution is respected. He guarantees, through his arbitration, the regular functioning of public powers as well as the continuity of the state. He is the guarantor of national independence, of territorial integrity, of respect for community agreements and treaties."

This text, however, does not point out that the powers of the

²³ In December 1958 General De Gaulle obtained 62,394 of the 79,471 votes cast.

²⁴ See G. Berlia, "Le Président de la République dans la Constitution de 1958," R.D.P. 71 (1959); "Les pouvoirs du Président de la République comme gardien de la Constitution," R.D.P. 565 (1959).

President—and this is perhaps the essential innovation of the constitution—are of two kinds. Some are traditional in the parliamentary system and thus require a ministerial counter-signature. But the others are personal and already show a profound change in the conception of the presidential office.

A. Powers Submitted to Countersignature

In principle, these powers are nominal, for the countersignature is the sign of ministerial responsibility. Article 20 of the constitution states, moreover, that the government “determines and conducts the policy of the Nation” and that it is responsible before Parliament.

It does not seem necessary to dwell at length on these powers which are traditional in the parliamentary system: the promulgation of laws, signature of ordinances and decrees, nomination of public officials, etc. . . .

B. Personal Powers

These powers are the more important because the President of the Republic has not yet used them. Their personal character results from the fact that they are not submitted to countersignature (art. 19).

Certainly the nomination of the Prime Minister (art. 8) may be left out of the discussion, for in the traditional conception of the parliamentary system, this choice belongs to the Chief of State. The countersignature, when it exists, has no formal significance and does not modify this power to choose. But it is otherwise with other personal powers of the president.

1. *The referendum (art. 11)*. On the proposal of the government during sessions or on the joint proposal of the two assemblies, the President may submit for referendum any bill “bearing on the organization of public powers, bearing on the approval of a Community agreement or tending to authorize the ratification of a treaty which, without being contrary to the constitution, would have effects on the functioning of its institutions.”

It is obvious from the text that the President is not legally required to defer to the petitions which are submitted to him. This power of submitting a bill to referendum permits the country to decide on important texts, in regard, for example, to European organization. There is a danger, however, that by means of the referendum the nation may be placed in opposition to the Parliament, which is legally its representative.

2. *The right of dissolution (art. 12)*. This right is the very essence of the parliamentary system since it permits the people to settle the differences which might exist between the government and the Parliament. But in the traditional parliamentary system this

right is granted to the government and is expressed in the countersignature as is the case in England. As soon as the exercise of the right of dissolution is no longer combined with the countersignature, it may be considered, though wrongly, as a means for the President of the Republic to have his personal policies approved. If the new elections decide against him he thus risks a considerable loss of prestige which would make his constitutional position difficult. Such was the case when Marshal MacMahon decided to dissolve the Chamber of Deputies.

It is possible, however, that the use of the right of dissolution may be henceforth considered in the perspective of the "national arbitration" which the President wishes to guarantee. To General De Gaulle, for example, is often attributed the intention of dissolving the assembly if its present government should lose its majority. It is a fact that this intention, which is quite hypothetical, is a factor in the stability of the government. But at the same time, such a dissolution, though it would have an obvious political significance, would not have as an aim, (if the developments during the last two years are considered), the maintenance of a governmental team in power at any cost. In other words there is perhaps in this arrangement the beginning of an element of transformation of the parliamentary system toward more stability.

3. *The powers of the President in exceptional times (art. 16).* The President may dispose of all powers, without control, if "the institutions of the Republic, the independence of the nation, its territorial integrity, or the execution of international commitments are threatened in a serious and immediate manner and if the regular functioning of public constitutional powers is interrupted."

In the minds of the authors of the constitution this disposition is destined to permit the functioning of the system in case of events of exceptional gravity, as, for example, those of 1940. But inevitably the abuses that such a text might permit spring to mind, abuses such as those allowed by article 14 of the *Charte de 1814* or article 48 of the Weimar Constitution. Everything obviously depends on the man who will use the powers, but their very existence, without guarantees, might legitimately cause anxiety, all the more so because in exceptional cases the court has always approved broader powers for the government.²⁵

It is quite symptomatic that the President of the Republic has not as yet used these personal prerogatives.²⁶ Nevertheless the regime

²⁵ See A. Mathiot, "La théorie des circonstances exceptionnelles," *Mélanges Mestre*, 1956, p. 413 and the bibliography cited.

²⁶ The decisions of the President are again not submitted to the countersignature

instituted in 1958 has followed a development different from that which the texts seemed to indicate and this development is principally due to the personal attitude of General De Gaulle and the concept he has of the Presidency of the Republic.

THE EVOLUTION OF THE PRESIDENTIAL OFFICE
AND OF THE REGIME SINCE 1958

It is essential to make a certain number of preliminary remarks.

First of all it is inaccurate, starting from a few unhappy precedents, to consider that the role of the Chief of State in a parliamentary regime is a role of pure representation. From his very position he is capable of having a considerable if unnoticeable influence on the action of the government, of watching over the permanent interests of the State and assuring the functioning of the institutions. Under the Fourth Republic no one had a clearer conception of this role of the Presidency than M. Vincent Auriol.²⁷

Next it must be stated that today more than ever, and even in the most democratic regimes, the power of the president is personified in a man. Moreover, as we have already noted, the re-inforcement of the executive is a general tendency of representative systems. The traditional elements of the representative system might have been conceived in a stable world but they seem inadequate in the presence of the major problems with which the nations find themselves confronted every day. The evolution of British parliamentarianism in this respect is significant.

Such being the case it appears incontestable that the function of "arbitration" provided for by article 5 has taken a significance which could not be attributed to it in 1958. In this respect the speech delivered at Brest on September 7, 1960²⁸ by General De Gaulle is significant: ". . . France finds itself in a situation in which the Chief of State directs the State, the government governs and the Parliament deliberates and legislates. . . ." This "direction of the State" is obviously something else than the simple moral magistracy to which the office of Chief of State was reduced in a parliamentary regime.

It would be desirable at this point to draw up a list of the practices followed since 1958 in the relationship between the President of the Republic and the Parliament as well as in purely governmental action.

when he presents messages to the Parliament (art. 18) when he names the three members of the Constitutional Council whom he is to name and when he refers a matter to the Constitutional Council. (arts. 54, 61).

²⁷ See R. Drago, "L'article 32 de la Constitution du 27 octobre 1946," R.D.P. 157 (1953).

²⁸ See *Le Monde*, September 9, 1960.

The President of the Republic and the Parliament

Here we are confronted with an area in which the action as such of the President of the Republic has least manifested itself. Nevertheless two facts are particularly important and deserve to be pointed out.

Following the events of Algiers in January, 1960 the government asked the Parliament, in conformity with article 38, for the right to issue ordinances in legislative matters to assure the maintenance of order and the security of the State. Thus the law of February 4, 1960, which was mentioned above, was passed. But the Parliament deemed it necessary to stipulate that these ordinances would be made "under the signature of General De Gaulle, President of the Republic." The mention was useless since by virtue of article 13 the ordinances passed by the Council of Ministers are, in fact, signed by the President of the Republic (and also countersigned by the Prime Minister and the minister concerned). But by this arrangement the Parliament intended to show that it placed confidence in the person of General De Gaulle and by this very fact it placed itself outside the constitutional framework since the President of the Republic is not responsible (art. 68).

According to article 29 of the constitution, the Parliament is called into extraordinary session at the request of the Prime Minister or the majority of the members of the National Assembly. The session is opened and closed by decree (countersigned) by the President of the Republic (art. 30).

In the month of March, 1960 a majority of the deputies having requested an extraordinary session on agricultural problems, the President of the National Assembly referred it to the President of the Republic; but the latter refused to call Parliament into session, stating that a premature meeting would be inopportune.

Such a decision was certainly contrary to the constitution, for both precedent and the text of article 29, as well as previous practice and the spirit of the system of sessions itself, showed that the power of the President could not be discretionary.²⁹ Doubtless in the name of national arbitration General De Gaulle wished to make sure that the Chief of State refused to accept this interpretation.

Governmental Action

This governmental action of the President of the Republic is manifested in numerous ways. The "direction of the State" and the "public intervention" of the Chief of State are today confirmed by a certain number of acts which give his stamp to the political order.

²⁹ See G. Berlia, "La convocation d'une session extraordinaire du Parlement et la nature du régime," R.D.P. 303 (1960).

It has already been pointed out that the great number of "technicians" composing the governmental team implied a weakening of the parliamentary system. To this must be added the forming of "committees" presided over by the Chief of State, composed of ministers and high functionaries and in which questions of general policy are deliberated. Included are the committees on Algerian affairs, on community affairs and on foreign affairs.

There are, however, in particular two unequivocal manifestations of this governmental trend: on the one hand the press conferences, messages and communiqués which imply an effective and determined participation by General De Gaulle in general policy, and on the other hand the personal meetings with foreign statesmen invested with governmental responsibilities, whether it were President Eisenhower, Mr. MacMillan or Mr. Khrushchev. In all these cases the President acts alone and it is his policy which he states. It is obviously rather paradoxical to hear a Chief of State who is not responsible proclaim, for example, in a message to the armed forces on October 28, 1959, "Under my responsibility and with full knowledge of the facts I have determined our action in Algeria."

An unequivocal explanation of this attitude is given by President Chaban-Delmas of the National Assembly, secretary-general of the U.N.R. at the congress of his party in Bordeaux in November, 1959. "There will be henceforth two sectors," he stated, "a presidential sector and an open sector. The presidential sector includes: Algeria with the Sahara, the Franco-African Community, foreign affairs and defense. The open sector includes the rest, which is considerable. . . In the first sector, the presidential sector, the government executes; in the second, it decides its own course."

Nothing could be clearer, though the explanation by M. Chaban-Delmas must obviously not be considered an official thesis.

But on the other hand the parliamentary regime continues to see its procedures applied. And if the members of parliament criticize the policies of the President, they address their grievances to the government, declaring that they do not wish to know who has the responsibility of action, the government alone being responsible. In particular, such was the attitude of the National Assembly in the course of the debate on Algeria in October 1959.

It would obviously be unworthy of a jurist to try to make these practices coincide with the text of the constitution. It is certain, above all, that they rest on an equivocation on the meaning of the word "government." If the Chief of State directs the state and the government governs, it is doubtless conceivable in the mind of General De Gaulle that if the country is confronted with major problems like

those of the present moment, certain political decisions belong to the "direction of the State." On the other hand the former abuses of a parliamentarianism which was confined to Assembly rule might legitimately cause one to hope for more firmness in the exercise of the executive office, a firmness that requires the support of the Chief of State.

The governmental action of the President of the Republic, however, is incontestably extra-constitutional. And this action can be pursued only because General De Gaulle benefits from a favorable position *vis-à-vis* the government, the Parliament and the country. A change in this combination of circumstances might make the political practices followed since 1958 seem precarious.

CONCLUSION: THE NATURE OF THE REGIME

It is always vain to wish to pass an impartial judgment on political institutions at the very time when these institutions are in force. It will be attempted here to draw a few conclusions with all the scientific objectivity necessary for such a study.

1. It is certain that General De Gaulle does not have the traditional concept of a constitution that has been held in France since 1789, that of a barrier against the abuse of power. He has, if you will, a "British" concept of a constitutional regime, that which he set forth in April 1960 before the Westminster Parliament: "Without scrupulously written constitutional texts, but, by means of an irrefusable general consent, you find the means of assuring, on every occasion, the proper functioning of democracy without incurring either the excessive criticism of the ambitious or the frowning disapproval of lawyers."

This feeling no doubt explains that considerations of efficiency are more important to him than legal rules whose meaning is always susceptible to change.

2. In the speech of presentation of the constitutional text before the General Assembly of the Council of State,³⁰ M. Michel Debré stated that the system provided for by the constitution was half-way between the parliamentary system and the presidential system. But the constitutional practices since 1958 belie this statement, for the presidential system presupposes a parliament entirely free from presidential actions, which is not the case.³¹

3. "Popular consent"; the support sought by General De Gaulle in public opinion, the assent given by a considerable majority to the

³⁰ R.F.S.P. 1959, no. 1.

³¹ See G. Berlia, *loc. cit.*, p. 309.

constitutional draft which he supported, clearly recalls the "Caesarian democracy," which also found its justification in popular support.³²

But this popular support given to a man no longer has the disadvantages which it had in the nineteenth century by reason of the international repercussions of any governmental action and of the development of the means of expression and the political organization of the citizens. In his masterful *Pouvoir - Les génies invisibles de la Cité*, Guglielmo Ferrero stated that democracy could live only on condition that two principles be respected: the right of opposition and freedom to vote. At the present time these two principles are respected, and, as was pointed out earlier, the democratic character of the regime cannot be questioned.

4. The observer thus finds himself, perhaps in spite of himself, led back to the parliamentary system. Is it really a paradox to say that the system is parliamentary, and would it not be better, as certain people propose, frankly to revise the constitution and institute a French form of the presidential system?³³

It has often been pointed out in regard to the constitution of 1958 that the parliamentary regime instituted was the "dualist parliamentarianism" which France had practiced from 1830 to 1848: the government serves as a link between a Chief of State and a Parliament which both play an effective role. This rapprochement would be a regression only if the political conditions were similar, whereas what has been said above shows that such a parliamentarianism is capable of being applied to a much more democratic regime.

It is, however, a rapprochement which very few have made. A rereading of the constitution of 1875 will show that the powers of the President of the Republic are much broader than in that of 1958. And the presidential office from 1875 to 1879 was not a simple magistracy of influence. To be sure, after the presidency of Grévy the role of the President was weakened as a reaction to the policies of MacMahon. But this means only that such a concept of parliamentarianism is difficult to manage, not that it is inapplicable. There are mistakes which the leaders of the Fifth Republic must not make and the future of the system which they have founded depends finally on them.

5. The care which the authors of the constitution of 1958 took to follow British parliamentarianism is obvious. It is absolutely certain now that the Westminster Parliament is above all a tribune

³² See M. Prelot, "La signification constitutionnelle du Second Empire," R.F.S.P. 31 (1953).

³³ The proposals along these lines were made previous to 1958. See in particular G. Vedel, "Libérer l'Exécutif, sinon organiser les partis," in *Fédération*, August-September, 1955.

and that the government, in it, exercises a preponderant if not exclusive power, its responsibility being questioned only at the time of general elections. The combining of such a system with a republican system is not an easy thing to do.

Certainly the French political system today possesses some "constitutional gaps" which doubtlessly shock the French more than foreigners. But must they not be considered to correspond with a set of political circumstances and thus to permit France to pass through a difficult moment in its history?³⁴

It has already been pointed out that the strengthening of the executive is today a tendency characteristic of all democratic regimes. It is not therefore surprising to note it in France in spite of certain mistakes which could have been avoided. It is clear that the political system in France is a system in search of itself. But between the abdication of the people and parliamentary demagoguery there is a middle road which the constitution of 1958 should permit us to find.

APPENDIX

Article 34

Laws are passed by the Parliament.

Laws determine regulations concerning: —civil rights and the fundamental guarantees granted to the citizens for the exercise of public liberties; the constraints imposed by National Defense on the persons and goods of the citizens; —nationality, the status and competency of persons, matrimonial laws, inheritances and gifts; —the determination of crimes and misdemeanors as well as the penalties which are assigned to them; penal procedure; amnesty; the creation of new judicial orders and the status of magistrates; —the basis of taxes, tax rates and the methods of collection of assessments of all kinds; the regulation of currency.

Laws also determine regulations concerning: —the electoral system of the parliamentary assemblies and of local assemblies; —the creation of categories of public establishments; —the fundamental guarantees granted to civil and military functionaries of the State; —the nationalization of enterprises and the transfer of property from the public to the private sector.

Laws determine the fundamental principles: —of the general organization of National Defense; —of the free administration of local collectivities, of their competencies and of their resources; —of teaching; —of the regulation of property, monetary privileges and civil and commercial obligations; —of the right to work, the right to unionize and social security.

Financial laws determine the resources and the obligations of the State in the conditions and under the reservations provided for by an organic law.

Laws of policy determine the objectives of the economic and social actions of the State.

The dispositions of the present article may be defined more accurately and complemented by an organic law.

³⁴ Certainly the present regime offers some characteristics of a "provisory regime," of a "mission" conferred by the people on General De Gaulle. See G. Berlia, *loc. cit.*, p. 314.